

In The Senate of the United States

Sitting as a Court of Impeachment

In re:

Impeachment of G. Thomas Porteous, Jr.,

United States District Judge for the

Eastern District of Louisiana

RESPONSE BY THE HOUSE OF REPRESENTATIVES
TO MOTION OF JUDGE G. THOMAS PORTEOUS, JR.
FOR DISCOVERY FROM THE HOUSE MANAGERS

The House of Representatives (“House”), through its Managers and counsel, respectfully responds to the Motion of Judge G. Thomas Porteous, Jr. for Discovery from the House Managers. First, it should be noted that the House has already produced, or is in the process of producing, all documents in its possession that it has identified as responsive to Judge Porteous’s Discovery Requests 4, 5, and 6 – which includes all materials to be used at trial. Further, the House on its own initiative and prior to its receipt of Judge Porteous’s discovery motion, has attempted to provide, and shall continue to provide, evidentiary materials in its possession that are not likely to be used at trial but are nevertheless sought by Judge Porteous’s Discovery Request 1 (such as financial records and certain witness statements that were not marked as trial exhibits). That Request, however, is so broad and burdensome – seeking in substance that the House make available to Judge Porteous all information and all materials from all sources (regardless of their relevance to the Articles and without reference to the contents of the materials being sought) – that the House objects to that Request as drafted. The House also objects to

Judge Porteous's Motion to the extent it seeks access to attorney work product of Impeachment Task Force legal staff, including Judge Porteous's request for a list of all witnesses interviewed by the Task Force (Discovery Request 2) and all memoranda or notes taken at any witness interview (Discovery Request 3).

In support of this response, the House states as follows:

I. FACTUAL BACKGROUND

The procedural record is clear: 1) the House has already provided all materials that it presently intends to use at trial and is promptly making further production as additional materials, if any, are identified; and 2) to date, counsel for Judge Porteous has reviewed additional documents at the House's offices on three separate occasions. As to this latter category, when counsel has requested copies of any documents reviewed, the House has complied promptly. Thus, the House has taken a broad view of discovery early on in this case precisely to avoid discovery disputes and ensure an expeditious trial.

The chronology of these disclosures – obscured in Judge Porteous's motion – is as follows:

1. The House made a near-complete disclosure of trial exhibits and trial witness statements to Judge Porteous on March 23, 2010, when it provided a disc of exhibits and accompanying exhibit list setting forth the evidence the House anticipates using at trial. That disc and exhibit list included deposition testimony and other witness statements of individuals who have been deposed or interviewed about the facts surrounding the Articles of Impeachment. As Judge

Porteous notes, the materials amounted to approximately 9,700 pages. The House has not been tight-fisted about discovery. At the time of the March 23 production, the House also informed counsel for Judge Porteous that it had other materials available for inspection and copying that were not included as exhibits.

2. Specifically, the House made some of these additional materials (approximately two file drawers) available for inspection by Judge Porteous's counsel on April 9, 2010. That event is not mentioned in Judge Porteous's pleading. The documents included numerous financial records of Judge Porteous and of certain other witnesses. Counsel made no requests for copies of documents from that April 9 review.
3. By letter dated May 6, 2010, Judge Porteous requested that the House make certain exhibits available in unredacted form. The exhibits requested by Judge Porteous were all contained in the House's March 23 production with redactions either made by the House or by the Department of Justice prior to transmitting relevant documents to the House.¹ The House assembled the unredacted documents and responded to Judge Porteous in a letter dated May 14, stating that the documents were available for review.² Counsel reviewed the documents on

¹As an example, the House had redacted materials to delete certain references to third parties, such as other state judges, where the conduct of those judges did not result in prosecutions and the information is not relevant to the Articles of Impeachment.

²The House explained to Judge Porteous's counsel that it only had the ability to remove the redactions that it had made, and it could not unredact any of the redactions made by the Department of Justice.

May 20 and requested a complete set. On May 21, 2010, the House provided a complete set of the unredacted materials that had been reviewed by Judge Porteous's counsel the day before.

4. On May 21, 2010, the House also provided Judge Porteous with an updated exhibit list and an updated disc of exhibits, which included a small number of additional documents that were not contained in the March 23, 2010 production.³
5. On May 26, 2010, the House made additional materials (approximately a little more than a box of materials) available for inspection by Judge Porteous's counsel. The documents consisted generally of additional financial records for Judge Porteous and certain other witnesses. After that review, Judge Porteous's counsel informed House staff counsel that they would likely request copies of certain of those documents, but no specific request has yet been received.⁴

Thus, the House has strived, and shall continue to strive on an ongoing basis, to be as open as possible with Judge Porteous in providing him with relevant evidentiary materials in its possession.

³It is inevitable in any litigation that an exhibit list will undergo changes over time, as exhibits are added, deleted, or edited as the case moves closer to trial. For example, the House is likely to use summary charts or time-lines that are based on the exhibits that have already been identified and produced. When such documents are prepared they will be added to the exhibit list and provided to counsel for Judge Porteous.

⁴As Judge Porteous has noted, the House has identified some additional materials that it will soon make available for inspection and copying and has so informed counsel for Judge Porteous.

II. JUDGE PORTEOUS'S DISCUSSION OF THE PROCEDURAL BACKGROUND

In the “Introduction and Procedural Background” section of his discovery motion, Judge Porteous alludes to a variety of factual circumstances in an attempt to paint a picture suggesting that he has been kept in the dark about the evidence in this case, and to suggest a backdrop against which his discovery requests should be considered. An accurate consideration of the procedural background, however, compels precisely the opposite conclusion and demonstrates that Judge Porteous has been provided virtually complete information as to the evidentiary details of the House’s case.

For example, Judge Porteous notes that there was no prior criminal trial where discovery would have been provided. This ignores the fact that there was a full-blown adversary hearing in the Fifth Circuit, at which ample discovery was provided by investigatory counsel, and at which Judge Porteous heard the witnesses testify and cross-examined them under oath. Judge Porteous also complains that he received discovery in the nature of witness statements from only a “handful” of witnesses who testified during the Impeachment Task Force hearings, yet it is essentially this same “handful” of witnesses who will testify at the Impeachment trial. Moreover, with the exception of the House having obtained court records of curatorships assigned by Judge Porteous to Robert Creely, and the transcript of the October 16, 1996 recusal hearing in the Liljeberg case, the documentary evidence relating to Articles I (the Liljeberg case) and III (Judge Porteous’s bankruptcy) is largely unchanged.

Further, the House Impeachment Task Force held public hearings where the critical “handful” of witnesses testified and where Judge Porteous’s current counsel had the opportunity

to examine them. Judge Porteous attempts to minimize this event by claiming that his counsel was limited in his ability to cross-examine the witnesses at those hearings. That contention entirely obscures the facts that: 1) the House Impeachment Task Force provided counsel the extraordinary courtesy of permitting him to participate and examine witnesses at a House proceeding; 2) prior to those hearings, the House provided Judge Porteous's counsel with the Impeachment Task Force depositions of the witnesses who would be testifying, 3) though the House operated on a "five minute rule" for Members, Mr. Westling was initially provided ten minutes, and whenever he sought additional time – which he did on two occasions – such time was granted to him by Task Force Chairman Adam Schiff without any time limitation,⁵ and 4) Judge Porteous now has personally heard the witness testimony under oath of virtually all the essential witnesses and has a transcript for use at the Impeachment trial.

Finally, the House, by virtue of the highly detailed and documented Impeachment Report, has provided Judge Porteous with what can only be described as a witness-by-witness, document-by-document preview of the House's case.

Thus, in light of the Fifth Circuit proceedings, the Impeachment Task Force hearings, the detailed Impeachment Report, and the extensive document productions made to date, Judge

⁵See *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part I), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary*, Ser. No. 111-43, Nov. 18, 2009, 111th Cong., 1st Sess., 189 (Mr. Westling: "Mr. Chairman, I am noticing my light is on. Could I have a few more moments?" Mr. Schiff: "Yes, of course, Counsel."); *To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part IV), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary*, Ser. No. 111-46, Dec. 15, 2009, 111th Cong., 1st Sess., 51 (Mr. Westling: "Mr. Chairman, I note my light is on. May I proceed." Mr. Schiff: "Of course.").

Porteous's contention that he is in some way uninformed of the factual nature and evidentiary detail of the House's case is simply meritless.

III. GENERAL PRINCIPLES

In its May 11, 2010 letter to counsel for Judge Porteous, the House stated its position clearly. It agreed to produce: “1) any tangible evidence the House Managers intend to use at trial; 2) any sworn or adopted statement of a witness to be called at trial; 3) transcripts or substantially verbatim statements of witnesses who will testify at trial; and 4) any exculpatory evidence.” Additionally, in that same letter, the House made clear, as it reiterates in this Response, that it would not construe its discovery obligations narrowly: “The House has in fact provided materials (as well access to inspect materials) that exceed those categories, and exceeded the discovery it provided in the Hastings and Nixon proceedings. It has done so, not because Judge Porteous is entitled to these materials, but rather in order to avoid unnecessary discovery disputes and to expedite the trial preparation process.”

The House is aware of the Senate Impeachment Trial Committee's “Disposition of Pretrial Issues” in the Hastings Impeachment proceedings in which the Senate Impeachment Trial Committee urged the House to make “the fullest disclosure possible.”⁶ As described above, the House has done, and will continue to do, just that.

⁶See Disposition of Pretrial Issues, Senate Impeachment Trial Committee (Judge Hastings), Apr. 14, 1989 at 9, reprinted in Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee Hastings, S. Hrg. 101-194, Pt. 1, 101st Cong., 1st Sess. at 289

IV. JUDGE PORTEOUS'S SPECIFIC REQUESTS

Judge Porteous, though having broken up his requests into 7 categories, seeks nothing less than all “information” that has been provided to the House from all sources, whether or not that information has any conceivable relevance to the Articles actually filed, and includes what would be work-product of House counsel. The framing of the discovery requests truly misconstrues the purpose of discovery – to make Judge Porteous aware of the evidence the House will use against him – and instead seems to be premised on the principle that Judge Porteous is entitled to duplicate the House’s investigation. Specifically, Judge Porteous is not entitled to know every individual with whom Task Force staff has spoken (Discovery Request 2), nor is he entitled to access to staff work product (Discovery Request 3).⁷

Thus, as described above, with regard to Judge Porteous’s other discovery Requests, the House has already produced, or is in the process of promptly producing, documents responsive to Request 5 (evidence the House intends to introduce at trial), Request 4 (records relating to criminal convictions of potential witnesses to the extent any such responsive documents exist and have been identified), Request 6 (exculpatory materials), as well as documents generally responsive to Request 1 (various categories of documents gathered by the Impeachment Task Force related to this Impeachment).

(1989).

⁷To the extent Judge Porteous’s Discovery Request 3 seeks any notes or memoranda by FBI Special Agent DeWayne Horner, no such documents exist. At no time during any witness interviews attended by Agent Horner did he take notes.

V. CONCLUSION



Judge Porteous's pleading sets forth a procedural history that is simply belied by the facts of Judge Porteous's in depth involvement and knowledge of the facts and evidence that relate to his conduct. The House on its own initiative, prior to any requests by Judge Porteous or the issuance of a discovery schedule by the Senate Trial Committee, has undertaken substantial efforts to ensure that Judge Porteous receives all materials that relate to the House's presentation of evidence in this case and materials that would be exculpatory, and it shall continue to do so.

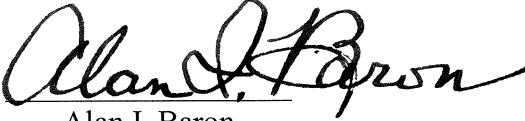
WHEREFORE, the House requests that the Senate Impeachment Trial Committee deny Judge Porteous's Motion to the extent it seeks the production of attorney work product materials, including the production of a list of all witnesses interviewed by Task Force staff (Request 2) and attorney notes or memoranda taken during witness interviews (Request 3). The House further requests that the Senate Impeachment Trial Committee deny Request 1 as overbroad and burdensome. The House will continue to provide discovery consistent with its positions stated in this pleading and in correspondence with counsel (generally tracking Judge Porteous's Requests 4, 5 and 6), and will continue to construe its obligations expansively.⁸

⁸The House will endeavor to cooperate with any principles of discovery the Committee states. As a matter of comity, the Committee should avoid issuing an "Order" to the House – a coordinate branch of Congress. In the Hastings case, the Senate in its "Disposition of Pretrial Matters," opted to state principles rather than seek to direct the House, and we urge that process here as well.

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By
 
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